No. 21255

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEB 20 1967

LOUIS M. MURRAY, CYNTHIA ANN WENTY and CECELIA MARIE WENTY, Minors, by Clifford H. Wenty, Their Guardian *Ad litem.*

Appellants,

vs.

THE UNITED STATES OF AMERICA, a Sovereign Body,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellants appeal from an order entered on May 27, 1966, by the Honorable Charles H. Carr, Judge of the United States District Court, Southern District of California, granting defendant's motion to dismiss without leave to plaintiffs to amend their complaint and dismissing their action with prejudice. [Clk. Tr. pp. 24-25.]

Plaintiffs had brought an action for wrongful death against the United States of America under authority of 28 U.S.C. §§ 1346, 1402, and 2671 through 2680. [Clk. Tr. p. 2.] Plaintiffs filed this appeal under 28 U.S.C. § 1291 and the court's jurisdiction rests upon this section.

Statement of the Case.

Appellants (plaintiffs below) have brought an action for the wrongful death of the wife of one of the plaintiffs and the mother of minors, on behalf of whom the action was brought by their guardian *ad litem.*

The complaint is set out in its entirety in the Clerk's Transcript at pages 4 to 6. It is properly summarized in appellants' statement of the case set out in appellants' opening brief at page 2.

Appellee filed a motion to dismiss and on May 27, 1966, an order was entered by the District Court granting the motion to dismiss without leave to plaintiffs to amend their complaint and dismissing the plaintiffs' action with prejudice on the ground that plaintiffs' complaint failed to state a claim upon which relief could be granted in favor of plaintiffs. [Clk. Tr. pp. 24-25.] Appellants appeal from this order.

Argument.

The District Court properly dismissed appellants' complaint on the ground that it failed to state a claim against the defendant, United States of America.

Under the provisions of 28 U.S.C. § 1346(b), the Federal Court should apply the law of the place where the act or omission occurred. In this case, since the act or omission occurred in the State of California, the District Court properly applied the law of the State of California.

Appellants, in their opening brief, cite the case of *Hopper v. United States,* 244 Fed. Supp. 314, 318 (D. Colo. 1965) for the proposition that the Federal District Courts may anticipate that a state will abandon

a doctrine that is outmoded or discredited. The appellants do not quote from the *Hopper* case; in fact, the above statement is not the holding of the court for the proposition on which this case actually stands.

The court actually said that, *in a case of first impression*, the Federal District Courts should anticipate what the Supreme Court of the state would do in such a case. In the *Hopper* case, the Federal District Court was faced with the question of whether or not there could be recovery by a bystander-witness to an accident, where the bystander-witness suffered mental suffering because of the effects of being such a witness. There was no "impact" as far as the bystander-witness was concerned.

The Federal District Court was to apply Colorado law, but the Colorado Supreme Court had never decided the question of whether there could be recovery by a bystander where there was no impact to the bystander. The court said, at page 318:

> "Like the impact rule it will be a matter of case to case attrition until its erosion is complete. In the meantime it would be indeed presumptuous for this court to make an Erie prediction that the Supreme Court of Colorado will repudiate the limitation in one fell swoop. Although the specific question has not been before the Colorado Court, the available evidence does not show that it has any aversion to the limitation in question. In the light of the numerous American cases which hold nonliability in circumstances like the present, it cannot be predicted that the Supreme Court of Colorado would be likely to adopt a rule contrary to the formidable array of cases holding nonliability."

Since there were no Colorado cases, the court applied the majority view.

Unlike the *Hopper* case, there are numerous cases in California holding that there is no liability where the alleged act or omission is the sale of alcoholic beverages. The California law is clear that one who sells alcoholic beverages to an intoxicated person or, for that matter, even to a minor, is not liable for damages caused by any acts of the intoxicated person. In *Cole v. Rush,* 45 Cal. 2d 345, 289 P. 2d 450 (1955), the Supreme Court of California stated the law of California, at page 349:

> ". . . [I]t is the general rule of law that it is the consumption of the intoxicating liquor which is the proximate cause of any subsequent injury by reason of such intoxication rather than the sale of intoxicating liquor.
>
> The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking."

The Supreme Court said, quoting from 30 American Jurisprudence 573, Section 607:

> " 'The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a liability on the seller for damages resulting from the intoxication' ".

In the case of *Dwan v. Dickson,* 216 Cal. App. 2d 260, 30 Cal. Rptr. 690 (1963), the court considered the question of liability arising from the sale of alcoholic beverages to a person known to be intoxicated

and the subsequent injuries and deaths resulting from an automobile accident in which one of the automobiles was driven by the intoxicated person. The court said, at page 264:

> "These authorities set forth the rule that the mere furnishing of alcoholic beverages, even to a person who is known to be intoxicated and is further known to be the driver in a motor vehicle, gives rise to no tort liability under California law."

The Supreme Court of California denied the plaintiff's petition for hearing in this matter, thereby approving the decision of the District Court of Appeal.

Likewise, in the case of *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P. 2d 530 (1949), the court affirmed the sustaining of a demurrer without leave to amend where the third count of the complaint alleged

> "that the fictitious defendants [the operators of a tavern] knew that he was a minor, and sold the intoxicating liquors to him *while he was already under the severe influence of intoxicating liquors.*" (Emphasis added.)

The suit arose out of a subsequent automobile accident. (94 Cal. App. 2d at 247.)

In the case of *Thomas v. Bruza*, 151 Cal. App. 2d 150, 311 P. 2d 128 (1957), the court held that the mere sale of alcoholic beverages to one who became intoxicated did not state a cause of action, even though it was alleged that the saloon operator knew that the customer became quarrelsome and pugnacious when drunk.

Appellants, at page 5 of their opening brief, attempt to distinguish the *Cole* case, *supra*, on the basis that

the *Cole* case speaks of furnishing liquor to an ordinary person and that the deceased sailor in the case at bar was not an ordinary person because of is previous intoxication. While appellee submits that the court's decision did not hinge on the word "ordinary," the cases of *Dwan v. Dickson, supra*, and *Thomas v. Bruza, supra, cannot be distinguished* on this basis. As pointed out, *supra*, in the case of *Fleckner v. Dionne*, a demurrer was sustained even though it was alleged that the sale of intoxicating liquors took place "while he was already under the severe influence of intoxicating liquors."

Appellants, at page 7 of their opening brief, admit that California has no civil damage or dramshop act. Appellants then point out that the legislature enacted Business and Professions Code Section 25602. This section provides:

> "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard, or to ny obviously intoxicated person is guilty of a misdemeanor."

This statute does not establish any civil liability. Although this statute was enacted in its current form in 1953, it was enacted in substantially its current form in 1935. Thus, this statute was in effect when all of the cases, previously cited by appellee for the proposition that there is no liability, were decided by the courts. Appellants argue that, because this code section was not cited by the court in *Cole v. Rush, supra*, the court was not aware of its existence. This is an obviously unfair analysis because, in the *Cole* case, 45 Cal. 2d at 351, the case of *Hitson v. Dwyer*, 61 Cal. App. 2d

803, 143 P. 2d 952 (1943), is discussed and, in this discussion, it is pointed out that it was alleged that the conduct in that case was in violation of the Alcoholic Beverage Control Act, which is the same Business and Professions Code section cited by appellants.

The California cases *are clear* that appellee The United States of America has no liability based upon the facts alleged in plaintiffs' complaint.

Appellants, at page 4 of their opening brief, admit that, because there were no Colorado cases applicable to the *Hopper* case, 244 Fed. Supp. 314 (D. Colo. 1965), the court applied the majority view. Appellants then argue that the California cases stating that there is no liability merely from the sale of intoxicating beverages are distinguishable from the case at bar.

Appellee submits that the cases are not distinguishable.

The majority rule in the United States, as in California, is that, absent a statute establishing civil liability for the sale of intoxicating beverages, there is no civil liability. 75 A.L.R. 2d 834 states:

> "Summarizing the decisions, without at this point going into detail, it may be said that generally there is no right of action at common law for damages sustained by the plaintiff in consequence of the sale or gift of intoxicating liquor to another."

There are only three jurisdictions which, in the absence of such a statute, allow recovery. These are the states of New Jersey, Pennsylvania, and New Hampshire, and the applicable cases are cited at page 10 of appellant's opening brief. The important thing to note is not the cases cited, but, rather, the fact that the cases

are from only three jurisdictions. Thus, appellants are arguing that the Federal District Court erred when it did not overturn existing California cases which hold no liability and adopt a rule enacted in only a small minority of states. This is contrary to what the Court of Appeals in the *Hopper* case, *supra,* states that the Federal Courts should do.

Thus, appellants would have this Court reverse the Federal District Court, overrule the California cases directly on point, and establish a minority rule for the state of California.

Appellee respectfully requests that the decision of the District Court of Appeal be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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